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No. 85-177

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

VERNE ORR, SECRETARY OF THE AIR FORCE, ET AL., PETITIONERS

v.

WILLIAM C. TURNER, ET AL., RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether this Court should exercise its discretion to decline review of the court of appeals decision holding, inter alia, that Section 706(g) of Title VII Civil Rights Act of 1964, 42 U.S.C. 2000(e)-5(g) does not prevent a court, when enforcing a consent judgment entered in a suit brought under Title VII against a public employer, from awarding back pay and a preferential right to a job to a class member who suffered a Consent Judgment violation, where the Consent Judgment established a special master's power to award "all appropriate relief" for violations of the Judgment and where the special master found that the Consent Judgment and its good faith provisions requiring all necessary and appropriate steps in order to meet the goals established in it had been violated.

II. Whether this Court should exercise its discretion to decline review of the court of appeals decision holding, inter alia, that the due process clause of the Fifth Amendment does not prevent a court, when enforcing a consent judgment entered in a suit brought under Title VII against a public employer, from awarding back pay and a preferential right to a job to a class member who suffered a Consent Judgment violation, where the Consent Judgment established a special master's power to award "all appropriate relief" for violations of the Judgment and where the special master found that the Consent Judgment and its good faith provisions requiring all necessary and appropriate steps in order to meet the goals established in it had been violated.

PARTIES TO THE PROCEEDING

Respondent, Raymond Little, is satisfied with Petitioners' statement regarding parties to the proceeding below.

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OPINIONS AND JUDGMENTS BELOW

Respondent is satisfied with Petitioners' statement regarding opinions and judgments below.

JURISDICTIONAL STATEMENT

Respondent is satisfied with Petitioners' statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent is satisfied with the Petitioners' statement regarding the constitutional and statutory provisions involved except to add Section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(b), which provides in pertinent part:

> The Civil Service Commission shall --
>
> (1) Be responsible for the annual review and approval of a national and regional equal opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;. . .
>
> . . .
>
> The plan submitted by each department, agency, and unit shall include, but not be limited to --
>
> (1) provision for the establishment of training and educa-

> tion programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential . . .

STATEMENT OF THE CASE

The Respondent is satisfied with the Petitioners' statement of the case except to add the following:

(1) Although there was no specific admission of liability of a Title VII violation by the Petitioners in the January 12, 1981 Consent Judgment, the Petitioners did agree to be bound by injunctions enjoining any future violation of Title VII and enjoining Petitioners from failing to implement and comply with the terms of the Judgment. Pet. App.[1/] at 38a, ¶¶3, 4.

(2) Further, although there was no admission of liability, numerous provi-

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[1/] References to the Petitioners' Appendix shall be "Pet. App."

sions of the Consent Judgment clearly establish that blacks were exceedingly underrepresented throughout the Petitioners' workforce and that Petitioners acknowledged this fact and covenanted to rectify the historic racial imbalance. Pet. App. 37a (second full paragraph); Pet. App. 39a, ¶7; Pet. App. 50a-54a (establishing hiring goals, including good faith effort to recruit, hire, and maintain certain racial proportions); Pet. App. 59a--"promotion goals" (including good faith effort to promote blacks according to established proportions); Pet. App. 62a, ¶1, (establishing affirmative action placements and providing that "in order to enable the Defendant Air Force to <u>improve</u> the black participation rate in the workforce at Eglin and the Air Force tenets thereof . . ." (emphasis supplied); Pet. App. 66a, ¶2 (allowing Defendants, prior to expiration of

Judgment, to seek elimination of the goals and affirmative efforts to meet them once goals have been substantially attained for a sufficient period of time). In addition to the above, the racial imbalance in the supervisory level jobs, such as the one in the instant case, at the time the Consent Judgment was approved was manifest. At that time there were only 10 black supervisors out of 497, or 2.05% black in a workforce that was nearly 6% black. Respondent's Exhibits 9, 9a and Attachment 5 to the Petitioners' First Semiannual Report filed pursuant to the Consent Judgment.

(3) Both the Consent Judgment and the goals contained in it are temporary in duration. Pet. App. at 39a, ¶6; 61a, ¶3. Nothing in the Consent Judgment requires the displacement of any white employee. The Consent Judgment does not create an absolute bar to the advancement of white

employees; to the contrary, it has a de minimis effect on the opportunity for white employee advancement given the extremely conservative goals agreed to by the parties. Ibid. The goals established in the Consent Judgment were not intended to maintain racial balance but simply to eliminate a historic imbalance. Pet. App. 59a, ¶1. The goals will end as soon as the percentage of black workers approximates the percentage of blacks in the relevant labor markets. Pet. App. 66a, ¶2. There were no quota obligations established in the Consent Judgment, only goals. Ibid.

(4) Section X of the Consent Judgment required Petitioners to make every "good faith effort" to promote blacks to supervisory positions when the percentage of blacks in those positions was less than a certain fixed ratio. Section II, ¶9 of the Consent Judgment

defined "good faith efforts" as "every necessary and appropriate step will be taken to realize the specified objectives." Pet. App. at 40a. The record before the special master was barren of any effort made by the Petitioners to comply with their covenant to exercise good faith efforts in promoting blacks when a consent judgment goal existed. Pet. App. 8a, 759 F.2d at 822.

(5) Evidence supporting the special master's finding of a consent judgment violation in the manner in which the position at issue was filled was well established at the evidentiary hearing held on this claim.[2/] That evidence included the following:

[2/] The Petitioners are wrong in claiming that the special master only found a "technical" violation of the Consent Judgment. Pet. at 17 and n.9. The special master found that the good faith provisions of the Consent Judgment had been violated. The court of appeals (cont.)

a. Documentary and testimonial evidence clearly established Respondent's extensive qualifications for the position at issue. 5 Tr. 90-95, 98; Pet. App. at 7a-8a. These qualifications included an A.A. degree and other continuing education courses, significant supervisory experience in both the U.S. Army and U.S. Army Reserves, and 12 years experience as an air conditioning mechanic including two years as supervisor in this field. Ibid., 5 Tr. 87-92.

b. The selection was made by an all-white selection panel. At the interview conducted by this panel for the job in question, Respondent was not asked any

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2/ (Cont.) reviewed the entire record to determine if this finding was clearly erroneous. See, Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Anderson v. City of Bessemer City, 470 U.S. ____, 105 S.Ct. 1504 (1985). The court of appeals correctly determined that the special master's finding was not clearly erroneous. Pet. App. at 5a-6a.

questions by the selectors about his extensive prior supervisory experience or education. 6 Tr. 234, Pet. App. at 7a. The selection panel did not ask Respondent about his military experience, his vocational training, his air conditioning schooling, nor about his technical air conditioning know-how. 6 Tr. 234-235, Pet. App. 7a. The selection panel reviewed none of Respondent's personnel records prior to the interview or selection. 6 Tr. 236, Pet. App. 7a. Respondent's interview lasted approximately fifteen minutes, while that of the white selectee may have lasted as long as an hour. 6 Tr. 210, 235, Pet. App. 7a. The selecting panel members admitted that at the time they made their selection they were ignorant of Respondent's record and background. 6 Tr. 157, 192, Pet. App. 7a.

c. One selecting official stated that the three factors he looked for in

candidates included the ability to lead, experience in the air conditioning field, and supervisory experience, and in light of that he believed Respondent was not the best qualified candidate for the job. However, on cross-examination, the same supervisor admitted that he was not aware of Respondent's prior supervisory experience and that he had not even reviewed Respondent's personnel records at the time of the selection. 6 Tr. 140-141, 157, 234. This selecting official also claimed that Respondent lacked the requisite mechanical skills to properly perform the job in question yet the performance appraisals prepared by this supervisor for Respondent directly contradicted this statement. R.E.3/ 209, Pet. App. 7a.

d. Another of the selecting supervisors testified that education was one of

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3/ "R.E." refers to the record excerpts filed in the court of appeals.

three key factors in the selection, yet on cross-examination he changed his testimony once it was brought to his attention that the white selectee had less education than Respondent. 6 Tr. 177-178, 194, 196, Pet. App. 7a. This selecting official also admitted on cross-examination that he had not reviewed Respondent's records at the time of the interview nor was he aware of Respondent's supervisory experience. 6 Tr. 197-198. The selecting officials were aware, however, that Respondent would have been the first black to ever hold a supervisory position in the department in question. 6 Tr. 156.4/

4/ Other corrobative evidence supporting the finding of a consent judgment violation as well as establishing racial animus was elicited from other witnesses at the trial. One personnel office employee testified that the personnel office had made multiple mistakes relating to the Petitioners' failure to implement the Consent Judgment properly. 4 Tr. 74, 88-89. The same official also testified that Petitioners'employees responsible(cont.)

(6) Both the PMC, which presented Respondent's claim to the special master, and Respondent urged the special master and district court to make a finding of intentional discrimination in light of the egregious facts involved in this selection. R. E. at 47-48; 7 Tr. 46-49. The

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4/ (Cont.) for implementing the Consent Judgment made unilateral interpretations of the Consent Judgment, without court approval, which adversely affected class members. 4 Tr. 63-64, 79-80. Furthermore, an EEO investigator at the Eglin Air Force Base testified that the Eglin officials responsible for reviewing individual EEO investigation reports prepared by this investigator pursuant to the Consent Judgment had on numerous occasions altered his investigation reports, changing them to reflect no discrimination when the reports had initially concluded that discrimination existed. 4 Tr. 15-16. This same EEO investigator further testified that one of Petitioners' attorneys (JAG) had told a large group of Eglin supervisors at an employment seminar that they "could lie to the EEO investigators" during EEO investigations, "but don't lie to me." 4 Tr. 13. This testimony went unrebutted. Further, this same EEO investigator appeared to have been himself a victim of unlawful reprisal at Eglin because he had spoken out about discriminatory practices he had uncovered. 4 Tr. 41-43.

special master and the district court felt they did not need to reach this issue, since they found that a Consent Judgment violation had occurred. If this Court were to grant certiorari and reverse the court of appeals, Respondent would be entitled to prove on remand that Petitioners' acts constituted intentional discrimination and/or contempt. See ¶6, pp. 26-32, infra.

(7) There was no bona-fide seniority system in place at Eglin Air Force Base.5/

(8) The Petitioners have never frontally challenged any provisions of the Consent Judgment claiming that they

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5/ Petitioners make an unexplained reference to a "collective bargaining agreement that was not made a part of the record below." Pet. at 17, n.20. Whatever the intention of this inexplicable reference, it is clear that there was no evidence of this at the trial and it was never an issue before the special master, the district court, or the court of appeals.

violate either Title VII or the Fifth Amendment.

(9) No white employee at the Petitioners' facility has ever come forward to object to or intervene in any of the proceedings in this case. This includes: (1) no objection or intervention at the two fairness hearings held before the district court on December 16, 1980 and January 12, 1981; (2) no objection or intervention in the proceedings before the special master concerning Respondent's claim; (3) no objection or intervention before the district court concerning that claim; (4) no objection or intervention before the court of appeals concerning that claim; and (5) no intervention or amicus application before this Court relating to the Petitioners' application for certiorari.

(10) The January 12, 1981 Consent Judgment was substantially modified by

order of the district court on January 25, 1985. Respondent's Appendix at 1a-34a. This modification was jointly requested by the plaintiffs and defendants in the underlying case. The modified Consent Judgment completely eliminated the administrative complaints procedure, including the special master, which had been in effect pursuant to §IX of the January 12, 1981 Consent Judgment. Respondent's Appendix at 6a-7a.

REASONS FOR DENYING THE WRIT

I. THE TITLE VII QUESTION

Petitioners rely exclusively upon this Court's decision in Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____ 104 S.Ct. 2576 (1984) in arguing that review of the decision below should be granted. Respondent contends that the

court of appeals did not err in applying this Court's decision in Stotts and, therefore, since no conflict with this Court's decision exists, review should be declined. Further, this Court should exercise its discretion in declining review given the esoteric and unusual fact situation presented through the instant Consent Judgment and the claim arising under it which makes this case an inappropriate vehicle by which to attempt resolution of the issues which Petitioners claim have been raised by the decision below.

(1) The court of appeals correctly held that since there was no §703(h) bona-fide seniority system at issue in the instant case, this Court's decision in Stotts was inapplicable. It is abundantly clear from reading Stotts that the issue "at the heart" of that case was "whether the District Court exceeded its powers in entering an injunction requiring white

employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." Id. 104 S.Ct. at 2585. The court of appeals correctly refused to apply Stotts in the instant case because no bona-fide seniority system was affected by the special master's decision.

(2) The court of appeals also correctly found Stotts inapplicable since no third party rights, such as those in Stotts, were involved here. At no point during the entire proceedings of the underlying litigation which resulted in the entry of the Consent Judgment in this case6/ did any nonclass members come forward to object and/or intervene in the proceedings. There were two fairness hearings held prior to the Consent

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6/ The original lawsuit, Turner v. Marks, PCA 76-175, was filed in 1976.

Judgment being approved on January 12, 1981 and there were no objections filed by nonclass members to its provisions. Further, no nonclass members ever objected or attempted to intervene in any of the proceedings before the special master, the district court, the court of appeals, or this Court concerning the instant claim of Respondent and the relief ordered by the special master.7/

7/ Contrary to the Petitioners' assertion, see, Pet. at 13, 20 the special master did "carefully tailor" the relief to redress the violation. Given the fact that the vacancy in question had been filled in violation of the court's order, Respondent would have been fully entitled to request that the white selectee for that position be bumped from it since he was the illegal beneficiary of the Defendants' illegal conduct and therefore had no lawfully vested rights. See, Spagnuolo v. Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983) and Lee v. Macon County Board of Education, 453 F.2d 1104 (5th Cir. 1971). Respondent did not request such relief, nor did the special master choose bumping as the remedy for rectifying the Consent Judgment violation. Thus, contrary to Petitioners' assertion, third party rights, although not lawfully vested, (cont.)

Thus, the court of appeals correctly held that Stotts was inapplicable to the instant litigation based on that ground as as well.[8/]

(3) The court of appeals also correctly found that Stotts was inapplicable to the instant case since the Defendants had agreed to the entry of the Consent Judgment, which was analogous to an employer entering into a voluntary affirmative action plan. In this respect, the court of appeals found that this Court's decision in United Steelworkers v. Weber, 443 U.S. 193 (1979) provided the

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7/ (Cont.) were considered by Respondent in requesting his relief and by the special master and district court in ordering the relief.

8/ Petitioners argued before the court of appeals that the special master's order essentially required "the Secretary hire or promote only class members until the 'goals' are met." The court of appeals correctly determined that this was a "false issue" given the fact that there was "simply no such holding in the special master's report." Pet. App. at 8a.

appropriate guidance for construing the Consent Judgment. Pet. App. at 13a-17a. The court of appeals was totally correct in adopting this analysis, for had it adopted Petitioners' arguments, it would have required the sub silentio overruling of this Court's decision in Weber. As the following discussion demonstrates, the reasons for the correctness of this ruling are manifest, given the nature of the Consent Judgment and the facts in the instant case.

First, the goals contained in the Consent Judgment were extremely modest and of limited duration. Weber, 443 U.S. at 492. The Consent Judgment did not create an absolute bar to the advancement of white employees. To the contrary, given the de minimis nature of the goals, white employees still enjoyed almost totally unfettered employment opportunities.

Second, there was no quota or absolute preference for blacks established in the Consent Judgment. And when the goals in the instant case are compared to the quota obligations approved by this Court in Weber, the correctness of the court of appeals' decision is obvious. In Weber, the affirmative action plan required a 50/50 selection rate until the historic racial imbalance was corrected. The instant Consent Judgment, first, requires no such quota selections, and second, it establishes goals that in some categories, such as the supervisory ranks, requires the Defendants to raise their black percentage to only approximately six percent (6%) black.

Given these facts, the court of appeals was perfectly correct in following this Court's decision in Weber and not doing what Petitioners now suggest (albeit sub silentio) that this Court

should do; i.e. overrule or emasculate Weber.

(4) The Petitioners state at p. 12 of their Petition that the court of appeals construction in this case of "the term 'all appropriate relief' which is surely found in most, if not all, consent judgments . . . " makes this case significant. Respondent suggests this is not the case given the uniqueness of the instant Consent Judgment. Petitioners do not explain or describe that §IX of the January 12, 1981 Consent Judgment in which the language "all appropriate relief" arises is in the context of a very detailed and complex enforcement mechanism which had been agreed to by the parties at the time the Judgment was approved. See Pet. App. at 56a-59a. This provision is extremely unique to the instant Consent Judgment since this enforcement mechanism was intended to replace the normal EEO

administrative process at the Eglin Air Force Base.9/ The parties intended that this complaint mechanism would replace the old EEO administrative process and provide a speedy mechanism by which class members could receive full and prompt relief from the special master for meritorious grievances. See transcript of January 12, 1981 fairness hearing at 15-16, Doc. #318.

Given the complex nature of the instant Consent Judgment, it was perfectly

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9/ The uniqueness of this provision is best illustrated by the fact that this entire section (§IX) of the January 12, 1981 Consent Judgment was eliminated by the parties when they modified the Consent Judgment through order of the district court on January 25, 1985. Petitioners failed to inform the Court of this fact in their Petition. See, Respondent's Appendix at 6a-7a.

Thus, it is evident that this issue, i.e. the implementation of the relief in the instant Consent Judgment through the special master created (and abolished) by the parties cannot arise again in the future in this case. Further, it is highly unlikely that such a mechanism, given its uniqueness to the Eglin Air Force Base, would ever arise again in any other case.

reasonable for the parties to have agreed that the special master, who would oversee the implementation of the agreement, should be empowered to fully resolve any disputes which arose under it. This enforcement mechanism is precisely what the Petitioners agreed to when they consented to the entry of this Order on January 12, 1981. The court of appeals did not err in finding that this agreement was enforceable and that the relief determined appropriate by the special master was fully and legally authorized to be awarded in the event of a consent judgment violation; especially one as egregious as that in the instant case. This does not conflict with Stotts, since Stotts did not address this issue. This does, however, fully comport with this Court's decision in Weber, since it is obvious that had the company and/or union in Weber refused to abide by the affirmative action plan

adopted there, the plaintiffs could have sued to enforce and remedy any violation of it. It is axiomatic that for every wrong there must be a remedy. The special master in the instant case simply applied that principle to the parties' agreement.

(5) Petitioners contend that the court of appeals erred in holding that the special master was entitled to order the relief he did. Petitioners again rely upon this Court's decision in Stotts to support their argument. Again, the court of appeals was correct in rejecting the Petitioners' construction of Stotts, since the specific provisions of the Consent Judgment involved in the instant case drew into question the parties' agreement as to what the special master was entitled to award if a consent judgment violation were found and did not involve the factual setting of Stotts, i.e. no violation of consent decree found. The court of

appeals correctly found that Stotts dealt with Title VII violations and not consent judgment violations.10/

(6) Petitioners further claim that the court of appeals erred in treating the special master's order implementing and construing the Consent Judgment in a way different from the modification order entered by the district court in Stotts. Petitioners again rely upon §706(g) for their assertion. The fallacy in the Peti-

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10/ Another basis exists for approving the relief awarded by the special master, altogether apart from that relied upon by the court of appeals. The Government concedes that make whole relief under 706(g) is available for victims of intentional discrimination. A fortiori, the same type relief should be available to a victim of a violation of a consent judgment which was entered into by the parties with the express intent of rectifying past racial imbalances. It is not surprising that the plain language of Title VII does not address the question of how a court should treat victims of such consent judgment violations. Respondent knows of no remedial statute that sets out remedies for violations of remedial orders. But that does not make victims of consent judgment violations any(cont.)

tioners' assertion, in addition to that described above, is demonstrated by examining another alternative basis which the special master and the district court could have used for providing the same relief which Respondent received. That basis stems from the inherent power of a district court to enforce its orders through contempt.

The instant Consent Judgment enjoined the Petitioners ". . . from failing to implement and comply with the enumerated provisions of this Judgment." Pet. App. at 38a, ¶3. It is clear from a review of the facts in the instant case, that Respondent could have instituted contempt proceedings against Petitioners for their "fail[ure] to implement and comply with the enumerated provisions of [the]

10/ (Cont.) less entitled to full relief. The fact remains that Respondent in the instant case was a victim.

Judgment." Respondent chose not to bring such proceedings, instead relying upon the procedures provided for rectifying Consent Judgment violations as set out in §IX of the Consent Judgment. The course of action chosen by the Respondent was perfectly reasonable under the circumstances since §IX of the Consent Judgment empowered the special master to award "all appropriate relief" in the event a consent judgment violation was found. Thus Respondent was not only not required to prove intentional discrimination in order to receive appropriate relief, but he was also not required to institute contempt proceedings in order to obtain that same relief.11/ See, United States v. United

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11/ Had the special master found intentional discrimination, which Respondent contends he was clearly entitled to do given the instant facts, Petitioners would have no ground for filing their Certiorari Petition. The same holds true for a finding of contempt. (cont.)

Mine Workers of America, 330 U.S. 258, 303-4 (1947); McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443-44 (1911); Hutto v. Finney, 437 U.S. 678, 691 (1978).

The correctness of the procedure

11/ (Cont.) It is ironic that the position taken by the Petitioners in this case will force Respondent, assuming that this Court were to grant certiorari and reverse the court of appeals, to seek on remand not only a finding of intentional discrimination, thereby eliminating the Petitioners' 706(g) arguments, but also a contempt citation, which would provide a third alternative basis for providing the relief the special master awarded. It is extremely difficult to imagine that the parties, when they negotiated the Consent Judgment, envisioned that class members seeking to have Consent Judgment violations remedied would be required to have the Secretary of the Air Force held in contempt of court in order to receive "appropriate relief." To the contrary, all indications in the record and in the Consent Judgment indicate that the parties intended that the procedures established through §IX would provide a swift and efficient mechanism for fully rectifying Judgment violations, without the necessity of class members proving either intentional discrimination or contempt.

outlined above is manifest in light of the fact that court orders, including those consented to by parties, must be obeyed. If they are not obeyed, then a party aggrieved by such disobedience must have a means by which to rectify such non-compliance. The Stotts case is a good example of this. This Court did not even hint in Stotts that the underlying goal obligations in that case, which required black selection rates of 50% for hiring and 20% for promotion, were illegal. Respondent suggests that had the defendants in Stotts refused to comply with those goal obligations, plaintiffs in that case would have been fully justified in moving the court to have the defendants held in contempt for such disobedience. Had such occurred, those class members aggrieved by the contemptible actions would have been fully entitled to be made whole for the injury suffered per black

letter contempt law. See, United Mine Workers of America, supra, McComb, supra, Gompers, supra, Hutto, supra. Thus, Petitioners' attempted extension of this Court's holding in Stotts relating to the 706(g) issue distorts not only the remedial provisions under Title VII but also those available pursuant to traditional standards of contempt law.

Were the Petitioners' argument accepted by this Court, it would mean that district courts would have had a portion of their traditional enforcement powers (i.e. contempt) diminished by Congress' passage of Title VII; passage of which was clearly intended to grant more not less powers to those courts.12/ It is

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12/ Petitioners' suggestion raises significant constitutional issues as well, foremost of which is whether Congress could constitutionally limit or remove the inherent powers of an Article III Court to fully enforce its orders. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

difficult to imagine a result less consistent with the intent of Congress which passed this law "triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long.'" Weber, 443 U.S. at 204, quoting 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey). Petitioners' suggestion is totally inconsistent with both Congress' intent in passing Title VII and this Court's construction and implementation of it.

(7) Another reason for denying the writ is found in §717 of Title VII.13/ Congress applied unique affirmative action obligations to the Federal Government through §717 when it made Title VII applicable to federal employers in 1972. Specifically, that section of the act

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13/ The court of appeals did not reach this issue. Pet. App. at 12a, n.2.

recognized Congress' concern that minorities had been relegated to lower paying jobs in tne federal service. Section 717(b) was enacted to rectify that historic racial imbalance. Therefore, Congress could not have intended that §706(g) limit federal employer affirmative action.

II. THE FIFTH AMENDMENT QUESTION

The special master's order fully comports with governing principles of equal protection and operates well within the bounds of permissible remedial action. Despite the Petitioners' assertions to the contrary, the ordered promotion of the Respondent to an unfilled vacancy following a Judgment violation is authorized by the Consent Judgment and does not unlawfully impinge upon any third party rights. Neither the facts of this case nor the controlling law support the Peti-

tioners' assertion that the November 28 Order raises a substantial question under the Fifth Amendment Due Process Clause.

First, Petitioners allege that the master's order has deprived innocent third parties of equal protection under the law. Second, they allege that any voluntary race conscious remedial action that benefits protected class members who have not individually proved themselves to be actual victims of illegal discrimination, violates the Fifth Amendment Due Process Clause, as that provision applies to the concept of equal protection.

The Petitioners' assertion regarding innocent third party rights merits little discussion. The master ordered that the Respondent be placed in an unfilled vacancy. The Petitioners have not shown that any third party sought to fill or was promised the vacancy. The master chose to place the Respondent in a vacant position

even though the illegal beneficiary of the Petitioners' Judgment violation could have been bumped. None of the third parties allegedly harmed by the Respondent's placement in the unfilled vacancy has ever complained or objected despite ample opportunity to do so. Considering that the Petitioners have failed to identify even one "innocent third party" who has been aggrieved or even mildly upset by the master's order, the issue of third party rights is simply not before the Court. The facts of this case do not yield any Fifth Amendment question regarding third party rights.

More disturbing than their assertion of third party rights is the Petitioners' challenge to the legitimacy of voluntary race conscious efforts to remedy the historic racial imbalance at Eglin. Ignoring the wisdom and practicality of encouraging parties to enter into consent decrees, the

Petitioners assert that any voluntary race conscious remedial action by a public employer is constitutionally prohibited.

The Petitioners' position conflicts with this Court's decisions upholding the legitimacy of reasonable race conscious remedies. United Steel Workers of America v. Weber, 443 U.S. 193 (1979); Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980); United Jewish Organizations of Williamsburgh v. Carey, 434 U.S. 144 (1977); McDaniel v. Barresi, 402 U.S. 39 (1971).

It is true that the Consent Judgment in issue does not contain a finding that Petitioners ever engaged in a pattern or practice of illegal discrimination. Such findings are rarely found in Title VII consent judgments. They are rare due to the nature and purpose of consent decrees. A consent judgment allows plaintiffs and

defendants in discrimination suits the opportunity to avoid costly and time consuming litigation while at the same time enabling them to obtain a judicial order which remedies the effects of past discrimination and insures future lawful conduct by the defendant. Likewise, entering into a consent judgment allows a defendant to remedy its wrongful behavior while avoiding the full liability for back pay, reinstatement, competitive seniority etc. that a judicial finding of discrimination would entail. As this Court recognized in Bakke, supra:

> [T]he requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self defeating. Such a requirement would severly undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law.

Id. at 364.

The remedial action embodied in both the master's November 28 Order and in the Consent Judgment in general, is less than the voluntary race conscious affirmative action this Court has previously upheld. In Weber, supra, this Court upheld the validity of a voluntary race conscious affirmative action program against a challenge that it was prohibited by Title VII. The program upheld in Weber granted an absolute preference to blacks for 50% of the positions available in a worker training program. The Consent Judgment at issue here involves no absolute preference. Likewise, contrary to Petitioners' assertion, the Respondent in this case was not awarded a promotion simply because of his membership in the plaintiff class; he was promoted because of his status as a victim of a consent judgment violation.

This Court expressly approved the use

of voluntary race conscious remedial action in Weber. See also, Bakke, Fullilove, Carey, and McDaniel, supra. Attempting to distinguish Weber, Petitioners would have this Court hold that the voluntary race conscious remedial action embodied in this Consent Judgment violates the Fifth Amendment because this Judgment addresses a public as opposed to a private employer.

Adoption of Petitioners' position on remedial action would require this Court to either overrule Weber or rule that Title VII allows a private employer to engage in discriminatory remedial action which if engaged in by the government would violate the principles of equal protection embodied in the Constitution. This case merits no such ruling.

CONCLUSION

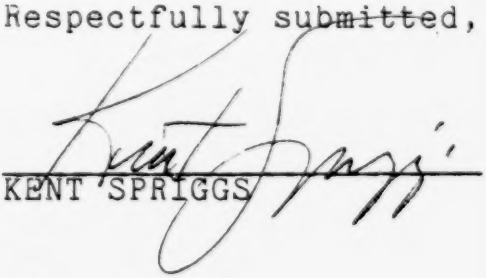
As shown by the foregoing, this case

does not warrant review by this Court. It involves only a single individual wnose action arose through an extremely unique Consent Judgment enforcement mechanism, which has subsequently been eliminated.

Further, assuming this Court were to grant review and reverse the court of appeals, the litigation would not end, since Respondent would be entitled on remand to seek a finding of intentional discrimination and/or contempt, which would provide him the same relief currently at issue.

Wherefore, this Court should enter an order denying the Petition for Writ of Certiorari.

Respectfully submitted,



KENT SPRIGGS

SPRIGGS & WARREN, P.A.
117 S. Martin Luther King
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CERTIFICATE OF SERVICE

This is to certify that in accordance with Rule 28 of the Rules of the Supreme Court, I have on this day served the required three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by depositing same in a United States mail box with First-Class postage prepaid and addressed to the following attorney for Petitioners:

Solicitor General
Department of Justice
Washington, D.C. 20530

This 26th day of September, 1985.

KENT SPRIGGS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PCA 76-175

WILLIAM C. TURNER, ET AL., PLAINTIFFS

vs.

SECRETARY OF THE AIR FORCE,
ET AL., DEFENDANTS

MODIFICATIONS TO THE CONSENT JUDGMENT
IN SUBCLASS A

Section 1:

A. This case arose under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16, and was brought against the Secretary of the Air Force and the Chairman of the Civil Service Commission (now Director, United States Office of Personnel Management). The plaintiffs in this case are the Ft.

Walton Beach Branch of the National Association for the Advancement of Colored People, the Progressive Community Improvement Organization, and individual black employees of, and applicants for employment at, Eglin Air Force Base. Plaintiffs filed an administrative complaint in May 1976. On November 10, 1976, the plaintiffs filed their judicial complaint with the District Court. The complaint alleged the existence of a pattern and practice of racial discrimination against black employees and applicants for employment at Eglin Air Force Base. The defendants denied the material allegations of the complaint. On January 28, 1977 the Court certified the following class:

> . . . all Negroes currently employed as civilians by the Air Force and its contractors at Eglin Air Force Base, all Negroes who have previously applied for civilian employment at Eglin Air Force Base and all

> Negroes who will in the future apply for employment at Eglin Air Force Base.

On November 14, 1978, the Court modified its previous class certification to define the class as follows:

> All Negroes who were employed as civilians by the Eglin Air Force Base on January 9, 1976, or at the time thereafter; all Negroes who could have filed administrative complaints of racial discrimination against Eglin Air Force Base on January 9, 1976, or at anytime thereafter; and all Negroes who may, in the future apply for employment at Eglin Air Force Base.

On January 12, 1981, upon the stipulation and agreement of the parties, the Court approved and entered a Consent Judgment purportedly resolving the litigation. As a result of a motion filed by plaintiffs after the entry of the 1981 Consent Judgment, the Court determined that the 1981 Consent Judgment did not resolve all of the claims against the

defendants, as employees paid from nonappropriated funds had not been considered in the negotiations leading to the entry of the 1981 Consent Judgment. Thus by order of March 31, 1982, the Court established a provisional Nonappropriated Fund Subclass "B," which was defined to include:

> Class members who were, are, or may be non-appropriated fund employees or applicants in accordance with the court's previous general certification of the class.

The remaining subclass, which was covered by the 1981 Consent Judgment, is Subclass "A". This subclass is defined as:

> "All Negroes who were employed as civilians in appropriated fund positions by the Eglin Air Force Base on January 9, 1976, or at any time thereafter; all Negroes who could have filed administrative complaints of racial discrimination against Eglin Air Force Base concerning appropriated fund employment or positions and all Negroes who may, in the future, apply for employment for appropriated

> fund positions at Eglin Air Force Base."

The certification was redefined on October 2, 1984 as follows:

> The plaintiffs' class overall is composed of all blacks who are members of either Subclass A or Subclass B as those subclasses are hereafter defined. . . .
>
> Subclass A consists of all blacks who were or will be employed in civil service positions serviced by Eglin Central Civilian Personnel office at Eglin Air Force Base or Hurlburt Field or who applied or will apply for employment for any such position or who as blacks holding such civil service positions have filed or could file administrative complaints of racial discrimination or retaliation against Eglin Air Force Base or Hurlburt Field and with the blacks included in Subclass A limited to those employed or applying for employment or having the right to file such administrative complaints of racial discrimination or retaliation on or after January 9, 1976 and during the life of the consent judgment.

It is to Subclass A and only Subclass A that the modifications, which are detailed

below, apply.

B. The plaintiffs and defendants intended by the entry of the 1981 Consent Judgment to resolve the issues underlying the complaint in a manner which would expedite the bargained for relief to class members without the time and expense of further litigation and fully protect the interests of all the defendants' employees and applicants for employment. The parties agree that the 1981 Consent Judgment has not fully accomplished the purposes for which it was entered into. Therefore, under the provisions of Section XIV the parties agree that the 1981 Consent Judgment must be modified as to Sections I, II, III, IV, VIII, IX,*/ XII, XIII and XV. The modifications contained herein supercede the provisions in the

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*/ The PMC is left in existence for the limited purpose and time for carrying out the duties to terminate the PMC as stipulated by the parties.

1981 Consent Judgment listed above which are eliminated in their entirety, except as provided below. These modifications do not modify nor address the goals and other provisions contained in Sections II, paragraphs 5 and 9; V, VI, VII; X; XI; and XIV, except where specifically identified below. The provisions of Sections V, VI, and Section X paragraph 2 shall expire by their own terms and shall have no further effect when the provisions have been completed.

C. The following Order modifying part of the 1981 Consent Judgment is issued with consent of the parties without any admission by the defendants of any racial discrimination or findings or conclusions by the Court of any violation of the Civil Rights Act of 1964, as amended, against plaintiffs or the class they represent. The Consent Judgment in Subclass A, including the modifications

herein, shall not be admissible as evidence of any past, present, or future racial discrimination by the defendants.

Therefore, it is hereby ordered, adjudged and decreed as follows:

Section 2:

GENERAL PROVISIONS

A. This Court has jurisdiction over the subject matter of this action and of the parties hereto. The Complaint states claims upon which relief may be granted under 42 U.S.C. §2000e-16, et seq.

B. This Court finds that entry of the modifications to the Consent Judgment in Subclass A is in the public interest, is in furtherance of the objectives of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, et seq., and protects the rights of all interested subclass members. The provisions detailed below are not intended to eliminate any prospective rights otherwise available to subclass

members under Title VII of the Civil Rights Act of 1964, as amended, or any other rights provided by law.

C. The Consent Judgment in Subclass A, including the modifications herein, shall remain in effect until January 11, 1988.

D. This Order modifying the Consent Judgment in Subclass A, does not address payment of costs and attorneys' fees arising out of this litigation.

E. If the defendants vacate the Subclass B, Nonappropriated Fund Class Member Consent Judgment pursuant to Section I, paragraph 4 of the nonappropriated fund Consent Judgment, the modifications of the Consent Judgment in Subclass A are also vacated in their entirety and the Consent Judgment in Subclass A remains in effect and unmodified. If the District Court or the Court of Appeals refuses to approve or affirm the approval of the

Subclass B, Nonappropriated Fund Class Member Consent Judgment, plaintiffs or defendants separately at their option without consent of the other party or the Court may vacate modifications contained herein to the Consent Judgment within 30 days of the District Court or appellate court decision.

F. The unaccomplished provisions of Section V of the 1981 Consent Judgment, Class Member Compensation, shall remain in effect until the remaining portion of the class member compensation fund plus interest is distributed to the class members. The unaccomplished provisions of Section VI of the 1981 Consent Judgment, Priority Employment, shall remain in effect until the list of class members is exhausted or one hundred class members have accepted the employment opportunities.

G. The terms and provisions con-

tained in this modification of the Consent Judgment in Subclass A constitute the entire agreement between the parties and shall supercede all previous communications, representations, or agreements, either verbal or written, between the parties herein.

H. The defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are hereby enjoined and restrained from engaging in any act or practice with the purpose or effect of discrimination or retaliating against any named plaintiff or class member on the basis of race and from failing to implement and comply with the enumerated provisions of this Judgment.

I. Defendants shall not, engage in or be a party to any act, policy or practice

which has the purpose of discriminating or retaliating in any manner against any plaintiff; any employee or former employee, or any applicant for employment because he or she has furnished information or participated in any respect in the prosecution of this action, or because he or she has made charges, testified, asserted a claim or participated in any investigation or proceeding under 42 U.S.C. §2000e-16, et seq., or any regulations promulgated thereunder.

J. The defendant, Secretary of the Air Force, shall ensure black representative(s) on the Civilian Policy Board and and any other manpower or personnel policy making boards at Eglin Air Force Base having significant responsibility for advising or making determinations with respect to civilian personnel or manpower policy matters.

Section 3:

PROVISION FOR RELIEF TO PERSONS WITH PENDING COMPLAINTS

A. Subclass members who have previously filed complaints of discrimination or Consent Judgment violation pursuant to Section IX, paragraphs 4 and 5 of the 1981 Consent Judgment which were received by defendants prior to February 13, 1984 will receive the following prospective relief: 20 promotions, one placement in an upward mobility position, 8 within-grade step increases, 4 adjustments to federal retirement benefits, $465,000, and non-monetary relief as described in Appendix 1. Promotions, placement in upward mobility position, adjustments to federal retirement benefits, and within grade step increases will be effective the first full pay period after the expiration of 79 days following the approval of the modification of the Consent Judgment in Subclass A by

the Court. Defendants will take action to cause the payment of money or to deposit the appropriate amounts into the retirement accounts of those who are to receive adjustments to federal retirement benefits after the expiration of 79 days following the approval of the modification of the Consent Judgment in Subclass A by the Court. No individual listed in Appendix 1 has received a promotion or other relief that is in excess of that which could be awarded on their pending claims.

B. The individuals listed in Appendix 2 whose complaints were presented to the Special Master for determination are not eligible to receive any relief for claims thus presented pursuant to this modification of the Consent Judgment in Subclass A. Those individuals listed in Appendix 2 who have pending claims in addition to those presented to the Special Master may be eligible for relief provided

for in Appendix 1 but only to the extent of their unpresented claims. The claims of those persons listed in Appendix 2 which were presented to the Special Master will proceed to determination as if this modification of the Consent Judgment in Subclass A had never been adopted.

C. No individual who had his or her claim withdrawn, settled or otherwise determined pursuant to the 1981 Consent Judgment is eligible to receive from this modification to the Consent Judgment in Subclass A any relief set forth in Appendix 1 for the claim that has been withdrawn, settled, or otherwise determined.

Section 4:

INSPECTION AND EVALUATION

A. The Office of Personnel Management shall conduct an evaluation of the personnel practices of the Eglin Air Force Base Civilian Personnel Office (CPO) once

every eighteen (18) months until January 11, 1988. The purpose of this evaluation will be to determine if the personnel practices of the CPO are in conformance with then applicable federal law, regulation, and procedure as well as the specific requirements set forth in this modification of the Consent Judgment in Subclass A.

The evaluation shall be conducted on site and shall include a review of Eglin's recruiting, hiring, and promotion practices. A random sampling of employment decisions shall be utilized to profile those practies. At the conclusion of the evaluation, a report detailing the results of the review as well as recommendations for improved operation and correction of deficiencies, if any, shall be prepared, a copy of which shall be forwarded to Plaintiffs' Counsel, who may submit written comments regarding the report to OPM.

B. The evaluation described in paragraph A, above, shall be in addition to and not in substitution of other audits, assistance visits, and evaluations conducted by the Office of Personnel Management in the normal course of its personnel evaluation and staffing responsibilities. OPM will provide copies of all such reports to Plaintiffs' Counsel.

Section 5:

REPORTING

A. On a semiannual basis commencing with the Court's approval of this modification of the Consent Judgment in Subclass A, Eglin shall file with the Court a report detailing its performance under the Consent Judgment in Subclass A, including the modifications contained herein.

B. The semiannual report shall contain, at a minimum, the following information:

1. A listing of all vacancies arising

during the previous six month period, listing the schedule, grade level, occupational series and name of each vacancy. Unfilled vacancies shall be so identified. Supervisory vacancies shall be so identified.

2. With respect to each vacancy listed in (1) above, Eglin shall identify which vacancies were filled through utilization of the Upward Mobility Program.

3. For each vacancy listed, the defendant shall state the name and race of the person selected to fill the vacancy, and the source of the fill shall also be indicated, i.e., promotion from a lower grade, OPM register, college co-op, Veterans Readjustment Act (VRA) appointment, etc.

4. The black proportion of the Eglin work force, both overall and by occupational category.

5. The black proportion of the first

level supervisory work force.

6. The black proportion of the supervisory work force above the first level of supervision.

7. A printout of all civilian employees at Eglin, arranged by job series and grade level within series, stating the following information for each employee:

i. name
ii. race
iii. type of appointment
iv. service computation date
v. entry on duty with Air Force (EODAF) date
vi. name of job

Section 6:

ALTERNATE COMPLAINTS PROCEDURE

A. Any subclass member who believes that he or she has been discriminated or retaliated against on the basis of race by actions of personnel at Eglin Air Force Base or Hurlburt Field may file a complaint with the Eglin Discrimination Complaints Office requesting that it be processed in accordance with the terms of

this Section. In accordance with the applicable provisions of 29 C.F.R. §1613.214, the complaint must be signed by the complainant and filed in writing with the Eglin Discrimination Complaints Office within 30 calendar days of the matter causing the complainant to believe that he or she had been discriminated against or, if a personnel action, within 30 calendar days of its effective date. The complaint is deemed filed on the date it is postmarked or, if there is no postmark, on the date it is received by the Discrimination Complaints Office.

B. The complaint must specifically detail the matter complained of, to include any facts known to the complainant. A complaint to be processed through this complaints procedure must be: reasonably specific; timely; based on complainant's race; not duplicative of matters in a previous complaint filed by the same com-

plainant and which has been adjudicated or is still in process; or not duplicative of matters in a previous grievance filed in writing by the same complainant under a negotiated grievance procedure.

C. Upon receipt of a complaint, the Discrimination Complaints Office shall notify the complainant in writing of its receipt. If the complaint meets the criteria set forth in paragraphs A and B above, the Discrimination Complaints Office will investigate the allegations of the complaint and within 90 calendar days will forward a report to the complainant. The report will contain a description of the complaint and a factual analysis of the circumstances surrounding the complaint. The 90 day time limit may be extended only upon the express written agreement of the complainant and the Discrimination Complaints Office. Nothing in this Section precludes the settlement or

informal resolution of the complaint at any time.

D. Within 15 calendar days after receipt of the report from the Discrimination Complaints Office, or within 30 days after receipt of the documents enumerated below in a - g, whichever is later, the complainant may supplement the report and must notify defendants of intent to proceed to the neutral third party. In supplementing the report the complainant is not entitled to compulsory discovery of any information from the defendants. However, within 45 days of the filing of a complaint, the defendants will provide to the complainant with respect to each fill action specifically complained of by the complainant, the following documents:

a. the career brief or Standard Form 171 of the complainant, if available;

b. the career brief or Standard Form 171 of the selectee, if available;

c. the position description concerning the position;

d. the Standard Form 52 concerning the fill action;

e. the Air Force Systems Command Form 134 concerning the fill action.

f. The following material from the PPRS computer printout will be provided:

1. Initial screening factors

2. Basic eligibility factors

3. The number of candidates considered, number of PPRS briefs generated, and where pertinent, indication of whether applicant supply, CAO, Command and Mainstream were considered and,

4. Selection statistics

g. the race of the selectee

These documents are the only documents that are required to be provided to the complainants. This section is not intended to provide, nor indicate, that the defendants are obligated to provide

any other documents to any complainant. Within 3 days after receipt of the complainant's supplementation, if any, or notice by complainant of desire to involve one of the neutral third parties, defendants shall forward a package of information to the appropriate neutral third party. The package of information shall consist of: a) the complaint; b) the defendants' report; c) the complainant's supplementation, if any. The identification of the appropriate neutral third party shall be obtained by defendants from a sequential list maintained in the Office of the Clerk of the District Court for the Northern District of Florida.

E. The complaints shall be referred to one of the three neutral parties identified in Appendix 3 in sequence. These neutral parties are not appointed pursuant to Rule 53 F.R.Civ.P. The neutral parties shall be compensated by the defendants.

If, for any reason, one or more of the neutral third parties is unable to continue serving, any replacement(s) shall be selected by mutual agreement of the plaintiffs' and defendants' counsel.

F. (1) Within 21 calendar days of receipt of the report and supplementation, if any, the neutral party shall make a decision based solely on the report and supplementation, if any. It is the intent of the parties that the neutral third party will seek, if appropriate, to mediate the dispute between the complainant and the defendants before rendering a decision which shall be based solely on the report, and supplementation, if any. The neutral party shall have no authority to call witnesses, hold any type of hearing or request information from the defendant or complainant.

(2) The parties have 30 calendar days from receipt of the decision of the

neutral third party to object to such decision. If neither party objects within 30 calendar days, the decision shall be binding on both parties.

If either party objects to the decision of the neutral third party such decision is void. In such event the complainant may pursue his or her claim but shall do so in this lawsuit.

(3) If any time limit, other than the time limit for filing or supplementing a complaint is not met, the complainant may immediately file a complaint in this lawsuit before the District Court as if the complainant has exhausted complainant's administrative remedies. Such complaint must be filed within 204 days of the filing of the initial administrative complaint.

The neutral third party shall be paid $75.00 per hour by defendants for all reasonable hours expended for work con-

cerning any individual complaint. If a complainant prevails in accordance with Title VII standards before the neutral third party and the decision becomes binding, the defendants will pay reasonble attorneys' fees, which shall be limited to $75.00 per hour to any attorney representing the complainant during the administrative process. The reasonableness of the hours billed by either the neutral third party or a complainant's attorney shall be subject to review by the District Court upon objection by the defendants. The burden of establishing the reasonableness of the hours expended shall be on the neutral third party or the complainant's attorney, if applicable. The neutral third parties shall provide to the defendants at least once a calendar quarter for any quarter during which time is expended pursuant to this section, a statement of hours reasonably expended for which they

seek reimbursement. When a decision of a neutral third party becomes binding, applications for attorneys' fees by claimants who prevail under this alternative complaint process shall be submitted to defendants within 30 days after the date the decision becomes binding.

G. The proceedings on individual complaints in District Court shall be de novo and procedures, rights, and remedies relating thereto are governed by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16. Pursuant to Title VII an award of attorneys' fees may only be made to a prevailing party.

H. The right of employees or applicants for employment to utilize the complaint procedures applicable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., the Civil Service Reform Act of 1978, or a negotiated grievance procedure, shall be preserved for

actions occurring subsequent to the Court's approval of these modifications. However, a class member wishing to present a complaint which falls under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., the Civil Service Reform Act of 1978, a negotiated grievance procedure or the alternate complaints procedure set forth herein in Section 6 may present the complaint under one but not more than one of these authorities.

I. The creation of this alternate complaints procedure is intended to provide an expeditious process by which subclass members can exhaust their administrative remedies prior to filing a judicial complaint. In any subsequent judicial proceeding following the completion of the procedures set forth in this Section, no offer of settlement, acceptance of settlement, or settlement or conciliation discussions will be admissi-

ble as evidence in Court. The decision of the neutral third party is the final step in the administrative process. The decision of the neutral third party shall not be admissible in any subsequent proceeding for any purpose in District Court.

Section 7:

OPT OUT

A. Individual class members who received or were considered for relief pursuant to Section 3 of these modifications have the right to opt out of Section 3 of the modifications, if they have objected to the modifications and indicated in writing that they would desire to opt out. These class members who so opt out are bound by all other provisions of the Consent Judgment as modified. The only class members who meet the conditions for opting out and who may elect to do so are listed in Appendix 4.

B. A class member who opts out will

not be entitled to any relief pursuant to Section 3 of these modifications. Relief identified in the proposed modifications for individuals who opt out will be eliminated. A class member who opts out shall have his or her complaint heard before the District Court as a separate civil trial in this lawsuit. Attorneys' fees shall only be paid to a prevailing party in accordance with Title VII standards. The complainant is responsible for arranging for counsel's services.

C. After approval of these modifications, the Court will notify in writing class members listed in Appendix 4 that they are presumed to have opted out of the relief provided in Section 3 of these modifications.

D. If an individual notified pursuant to paragraph C of this section desires not to opt out, he or she must notify the Clerk of the District Court in

writing within 28 days from the date the Court issues such notice.

E. If an individual who opts out of these modifications wishes to pursue his or her claim against the defendants, he or she must file a claim of discrimination or retaliation in this lawsuit by April 24, 1985.

Section 8:

RELEASE

A. Approval by the Court of this modification of the Consent Judgment in Subclass A shall operate to discharge the defendants from all liability to members of Subclass A arising under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e, et seq., for all counts of racial discrimination or retaliation arising out of Subclass "A" employment and hiring at Eglin Air Force Base occurring on or before the date of the approval of the modification of the Consent Judgment

in Subclass A by the District Court, except the claims of those persons identified in Appendix 2.

B. No complaint filed after February 12, 1984, by any Subclass A member alleging racial discrimination or retaliation by defendants shall be deemed settled, compromised, concluded, or discharged by this modification of the Consent Judgment and all such complaints shall be processed as provided in Section 6 herein. The 90-day time limit as provided in Section 6 shall commence upon approval of this modification of this Consent Judgment in Subclass A.

The Order modifying the Consent Judgment in Subclass A is entered with the consent of the parties.

Richard K. Willard
Acting Asst. Attorney General

ORIGINAL SIGNED
Thomas I. Atkins
Counsel For The National

W. Thomas Dillard
United States Attorney

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Curtis L. Bentz, Major, USAF
Counsel for the Department of
the Air Force

APPROVED this 25 day of January, 1985.

/s/Winstow E. Arnow
WINSTON E. ARNOW
Senior U.S. District Judge